

Lee Loy & Ors v Poh Kam Sang & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
C-02(NCVC)(A)-1801-09 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
7 DECEMBER 2017

Land Law — Possession — Recovery of — Application for summary possession of land — Rules of Court 2012, O 89 — Whether occupants mere squatters — Whether occupants could not show they had come to occupy the land lawfully — Whether there were no triable issues to warrant a full trial — Whether O 89 summary procedure for recovery of possession appropriate in the circumstances

The respondents were the executors of the estate of a deceased who died in 1975 leaving a piece of land ('the land') as one of his assets. The appellants individually came to occupy and build their dwellings upon the land at various times between 1967 and 1990. The respondents claimed they were not trespassers or squatters but that each of them was given permission to occupy the land by the deceased during his lifetime. The appellants tried to obtain temporary occupation licences ('TOLs') from the state government to occupy the land but were unsuccessful. When they learnt that the respondents intended to evict them, the appellants proposed their willingness to buy the land if the price was agreeable. They could not agree to the RM3m sale price quoted by the respondents. When the talks between the parties to resolve the matter failed, the respondents applied to the High Court by way of an originating summons ('OS') pursuant to O 89 of the Rules of Court 2012 for summary possession of the land. The appellants, in turn, applied (vide encl 63) for leave to buy the land from the respondents at a price not exceeding RM1.5m; alternatively, that they be given six years' time to vacate if an order for vacant possession was granted. The respondents objected to encl 63 saying they could not be forced to sell the land at a price fixed by the appellants and that the time period sought by the appellants to vacate was inordinately long and prejudiced the respondents' rights and interests in the land. The High Court allowed the OS, substantially dismissed encl 63 but granted the appellants nine months to vacate. The court found no evidence to show the appellants had permission or consent of either the deceased or the respondents to occupy the land; rather, that there was ample evidence to show they were occupying the land illegally. In their instant appeal against the High Court's decision, the appellants argued, inter alia, that the O 89 summary procedure adopted by the respondents for possession of the land was inappropriate because there were triable issues that warranted a full trial.

- A Held**, dismissing the appeal and affirming the decision of the High Court:
- (1) There was no error of law or fact committed by the High Court, whether in respect of the OS or encl 63 to merit appellate intervention. The appellants had raised no triable issues to warrant a full trial or to say that the O 89 application was inappropriate and unsuitable. The High Court was right in concluding that this was a suitable case for the grant of summary possession of the land (see paras 45–46).
- (2) The appellants claimed that each of them was given consent, licence or permission to enter and occupy the land by the deceased during his lifetime. But this claim was not borne out by the evidence offered by the appellants in their affidavits. Many, if not all, of the appellants had, in fact, only occupied the land after the death of the deceased in 1975. Apart from the tenth appellant, in respect of whom no information was offered, and the third appellant, the claims of the other appellants simply could not stand. This serious discrepancy severely undermined the credibility and veracity of the appellants. The High Court was right to hold that the appellants' claims that their entry and occupation of the land was with the consent, permission or licence of the deceased were without merit (see paras 37 & 42–44).
- (3) The appellants could not be allowed to approbate and reprobate at the same time — on the one hand, resisting the summary application and arguing that they were more than squatters and had a right to stay; on the other hand, implicitly acknowledging (eg by their TOL application) that they had no right to occupy the land and applying to court to compel the respondents to sell the land to them for not more than RM1.5m or, alternatively, that they be given time to vacate (see paras 38–39 & 41).

[Bahasa Malaysia summary]

- Responden-responden adalah pentadbir-pentadbir estet si mati yang meninggal pada tahun 1975 meninggalkan sebidang tanah ('tanah') sebagai salah satu hartanahnya. Perayu-perayu secara persendirian menduduki dan membina kediaman mereka di atas tanah pada pelbagai masa di antara tahun 1967 dan 1990. Responden-responden mendakwa mereka bukan penceroboh atau setingan tetapi setiap mereka diberi kebenaran untuk menduduki tanah tersebut oleh si mati semasa dia masih hidup. Perayu-perayu mencuba untuk mendapatkan lesen pendudukan sementara ('TOL') daripada kerajaan negeri untuk menduduki tanah tersebut tetapi tidak berjaya. Apabila mereka mengetahui bahawa responden-responden berniat untuk mengusir mereka perayu-perayu mencadangkan kesedian mereka untuk membeli tanah tersebut jika harga boleh dipersetujui. Mereka tidak bersetuju kepada harga jualan RM3 juta yang dipetik oleh responden-responden. Apabila perbincangan di antara pihak-pihak untuk menyelesaikan perkara tersebut gagal, responden-responden memohon kepada Mahkamah Tinggi melalui saman

pemula ('SP') berikutan A 89 Kaedah-Kaedah Mahkamah 2012 untuk milikan ringkas tanah tersebut. Perayu-perayu, sebaliknya memohon (melalui lampiran 63) untuk izin membeli tanah tersebut daripada responden-responden pada harga tidak melebihi RM1.5 juta; secara alternatif, bahawa mereka diberi masa enam tahun untuk mengosongkan jika perintah untuk milikan kosong diberikan. Responden-responden membantah lampiran 63 dengan menyatakan mereka tidak boleh dipaksa untuk menjual tanah pada harga yang ditetapkan oleh perayu-perayu dan bahawa tempoh masa yang dipohon oleh perayu-perayu untuk mengosongkan adalah terlalu panjang dan memprejudiskan hak dan kepentingan responden-responden di dalam tanah tersebut. Mahkamah Tinggi membenarkan SP, secara substansial menolak lampiran 63 tetapi memberikan perayu-perayu masa sembilan bulan untuk keluar. Mahkamah mendapati tiada keterangan untuk menunjukkan perayu-perayu mempunyai kebenaran atau izin daripada si mati atau responden-responden untuk menduduki tanah tersebut; atau, terdapat keterangan yang banyak untuk menunjukkan yang mereka menduduki tanah tersebut secara haram. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah, antara lain, bahawa A 89 prosedur ringkas yang digunapakai oleh responden-responden bagi milikan tanah adalah tidak wajar kerana terdapat isu-isu yang boleh dibicarakan yang mewajarkan perbicaraan penuh.

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Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

- (1) Tidak terdapat kesilapan undang-undang atau fakta yang dikalukan oleh Mahkamah Tinggi, sama ada berkaitan SP atau lampiran 63 untuk mewajarkan campur tangan mahkamah rayuan. Perayu-perayu tidak membangkitkan isu yang boleh dibicarakan untuk mewajarkan perbicaraan penuh atau untuk menyatakan bahawa permohonan A 89 adalah tidak wajar dan tidak sesuai. Mahkamah Tinggi adalah betul dalam memutuskan bahawa ini adalah kes yang sesuai untuk pemberian milikan ringkas tanah tersebut (lihat perenggan 45–46).
- (2) Perayu-perayu mendakwa bahawa setiap mereka diberi izin, lesen atau kebenaran untuk memasuki dan menduduki tanah oleh si mati semasa dia masih hidup. Tetapi dakwaan ini bukan bangkit daripada keterangan yang ditawarkan oleh perayu-perayu di dalam affidavit-afidavit mereka. Kebanyakannya, jika tidak, perayu-perayu telah, sebenarnya hanya menduduki tanah tersebut selepas kematian si mati pada tahun 1975. Selain daripada perayu kesepuluh, berkaitan di mana tiada maklumat ditawarkan, dan perayu ketiga, dakwaan perayu-perayu yang lain tidak boleh bertahan. Perbezaan yang serius ini menjejaskan kredibiliti dan kebenaran perayu-perayu. Mahkamah Tinggi adalah betul untuk memutuskan bahawa dakwaan perayu-perayu bahawa kemasukan dan penghunian ke atas tanah oleh mereka adalah dengan izin, kebenaran

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- A atau lesen si mati adalah tanpa merit (lihat perenggan 37 & 42–44).
- (3) Perayu-perayu tidak boleh dibenarkan untuk aprobat and reprobat pada masa yang sama — sebaliknya, menentang permohonan ringkas dan berhujah bahawa mereka adalah lebih daripada setingan dan mempunyai hak untuk tinggal; sebaliknya, secara tersirat mengakui
- B (contohnya melalui permohonan TOL mereka) bahawa mereka tidak mempunyai hak untuk menduduki tanah tersebut dan memohon kepada mahkamah untuk memaksa responden-responden untuk menjual tanah tersebut kepada mereka untuk tidak lebih daripada RM1.5 juta atau,
- C secara alternatif, bahawa mereka diberi masa untuk keluar (lihat perenggan 38–39 & 41).]

Notes

- D For cases on recovery of possession, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4378–4395.

Cases referred to

- Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343; [1991] 1 CLJ 343, SC (refd)
- E *Cheah Theam Kheang v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761, CA (refd)
- Cheow Chew Koon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, CA (refd)
- F *Chiu Wing Wa v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313, SC (refd)
- Juta Permai Sdn Bhd v Mohd Zain bin Jantan & Ors* [2001] 2 MLJ 322; [2001] 2 CLJ 1613, CA (refd)
- Ng Ben Thong & Ors v Krishnan all Arumugam* [1998] 5 MLJ 579, HC (refd)
- G *Norimah Bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2000] 3 MLJ 129; [2000] 3 CLJ 133, CA (refd)
- Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1; [1997] 1 CLJ 102, CA (refd)
- Sidek bin Haji Muhammad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313, FC (refd)
- H *Tekad Urus Sdn Bhd (as the attorney for KCSB Konsertium Sdn Bhd) v Penduduk yang menduduki kawasan yang dipanggil Desa Perwira dan lain-lain* [2004] 2 MLJ 306; [2004] 2 CLJ 199, CA (refd)

I Legislation referred to

- Pahang Land Rules 1992 reg 31
Rules of Court 2012 O 89
Rules of the Supreme Court O 113

Appeal from: Originating Summons No 24NCVC-113-04 of 2016 (High Court, Kuantan)

*Leong Yeen San (Lee Sok Wah with him) (Lee Sok Wah & Co) for the appellants.
S Vengadeswaran (S Vengadeswaran) for the respondents.*

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an application by the administrators of the registered owner, deceased, of land located at HM 6095 Mukim Gali Lot 7027 Daerah Raub, Pahang ('the subject land') for summary possession of the subject land under O 89 of the Rules of Court 2012. The application was allowed by the High Court.

[2] After consideration of the extensive oral and written submissions of both learned counsel for the respective parties and upon careful evaluation of the records of appeal, this court unanimously agreed with the decision of the learned judge and dismissed the appeal.

BACKGROUND FACTS

[3] In the affidavit in support, the respondents claimed, and this is not in dispute, that the subject land was alienated to one Poh Chan @ Poh Chan Nam by the State Government of Pahang on 26 September 1967. Poh Chan @ Poh Chan Nam ('the deceased') passed away in 1975. The respondents claimed that at the time of alienation, the subject land was unoccupied. After the subject land was alienated to the deceased, between 1967 and as late as 1990, the appellants started to occupy the subject land, building houses and having electricity and water services connected to these houses. The respondents claimed such occupation to be unlawful and illegal as their entry and occupation was without permission, licence, consent and/or without payment, whether to the deceased or to the respondents. The appellants are said to be trespassers or squatters simpliciter on the subject land.

[4] When the appellants learnt that the respondents intended to evict them, the appellants got together to form a committee to facilitate discussions with the respondents ('the said committee'). It is not in dispute that at all material times, the said committee represented the appellants. On 1 March 2015, the respondents notified the said committee of the unlawful occupation and required the subject land to be vacated. Following this notice, a meeting was held between the respondents and the said committee on 28 April 2015. At that meeting, the appellants, through the said committee is purported to have admitted that their occupation was unlawful. At that same meeting, the

- A respondents indicated their preparedness to sell the subject land at a price to be agreed. Unfortunately, the parties could not agree on the price. Despite numerous requests to vacate the subject land, the appellants refused to vacate.
- B [5] On 29 October 2015, the respondents caused a notice to quit within three months from the date of the notice. On receipt of this notice, the appellants sought the assistance of the local land office who called a meeting of all affected parties on 9 December 2015. At that meeting, the appellants once again, admitted to their unlawful and/or illegal occupation of the subject land, and further indicated their intention to purchase the subject land from the
- C respondents. Discussions on the sale continued until March of the following year but those discussions were unfruitful, as the parties could not agree on the price.
- D [6] After giving the appellants a final notice and warning to vacate, the originating summons was filed on 25 April 2016, seeking the following principal orders:
- E (a) that the appellants vacate the subject land and that the structures and buildings be demolished within eight days from the date of service of the order of the court;
- F (b) that the order of court is deemed served by leaving the same on a conspicuous part of the subject land;
- (c) that leave be given for the issue of a writ of possession and for the use of reasonable force in the execution of the writ of possession;
- (d) that the respondents be given leave to disconnect electrical and water supply to the subject land; and
- (e) general damages to be assessed.
- G [7] In resisting the originating summons, the appellants claimed that they had been in occupation of the subject land since the 1960s. Apparently, their occupation came about because of the action taken by the State Government of Pahang. In the state government's fight against the communists, the state
- H government decided to relocate the Chinese community to new villages in Sg Klau. The appellants did not relocate but chose to remain on the land which they were occupying at the material time. According to the appellants, the deceased, who was regarded as their leader, was alienated the subject land by the state government in the belief that the deceased would help the Chinese
- I community who did not relocate and build homes in the new villages. Between 1967 and 1975, the appellants built their homes on the subject land and they claim that at no time did the deceased ever complain or prevent the appellants from either building their homes or from occupying the subject land. There was both electricity and water supplies to the homes of the appellants. The

occupation by the appellants only became an issue after the deceased passed away in 1975.

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[8] In 2001, the appellants applied for the issue of temporary occupation licences or TOLs from the state government. The applications were rejected.

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[9] When the case came up for the first case management on 9 June 2016, the parties were given directions on the filing of affidavits in reply and also written submissions. The court fixed 21 July 2016 as the clarification or decision date. On 21 July 2016, the learned judge fixed 29 August 2016 as the date for decision of the respondents' originating summons.

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[10] However, on 15 August 2016, the appellants filed a notice of application (encl 63) together with an affidavit in support praying for the following orders:

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- (a) that the appellants/defendants be granted leave to buy the said land from the respondents/plaintiffs at the price not more than RM1.5m; and
- (b) in the alternative, the appellants/defendants be given six years from the date of vacant possession order to move out from the said land.

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[11] In their affidavit filed in support of encl 63, the appellants indicated that they were financially unable to pay the selling price of RM3m that was asked for by the respondents.

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[12] The respondents resisted the application citing that they cannot be forced to sell the subject land at a price that was never agreed; that the time period sought was in any event, prejudicial to their rights and interests in respect of the subject land.

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DECISION OF THE HIGH COURT

[13] The learned judge rendered decision in respect of both the substantive originating summons and the interlocutory application of the appellants.

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[14] In respect of the originating summons, the learned judge found no defence or issue of any merit raised by the appellants. The learned judge could not find from the affidavits filed in response to the application for summary order of possession, evidence to show or suggest that the appellants had the permission or consent of the deceased or the respondents to occupy the subject land. It was the view of the learned judge that the appellants' contention that the deceased had given them permission to occupy the subject land because the state government believed that the deceased would assist the appellants, was unsupported by any evidence and was in fact, entirely of the appellants' own

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A opinion. There was also no evidence to suggest that the alienation of the subject land to the deceased was upon the terms claimed by the appellants.

[15] The learned judge found that on the contrary, there was ample evidence to support the respondents' application. Amongst them was the appellants' own applications for TOLs. The learned judge saw these applications as acknowledgment by the appellants that they had no right to occupy the subject land. The unsuccessful discussions between the parties over the sale of the subject land to the appellants were further evidence in support of the respondents' case, that in these discussions, the appellants had offered to buy the subject land but the parties could not agree on the price.

[16] In relation to the appellants' interlocutory application (encl 63) seeking leave to buy the subject land at a price of not more than RM1.5m; or alternatively, that they be given six years to vacate the subject land, such time to run from the date of the order of possession; the learned judge found herself unable to accede to the appellants' application for several reasons.

[17] First, the court cannot force the respondents to sell the subject land at a price that the parties have never agreed to. Second, the six year period requested by the appellants was unreasonably long bearing in mind the appellants who were clearly squatters had unlawfully occupied the subject land for an already long period; and that such occupation was prejudicial to the respondents' right of enjoyment of the subject land.

Third, the court should not protect squatters, as decided by the Federal Court in *Sidek bin Haji Muhammad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313. Next, the provision of electricity and water supplies does not amount to acknowledgment of lawful occupation of the subject land. Finally, the appellants have never challenged the respondents' title to the subject land or their validity of title. All that was challenged was that permission to occupy the subject land had been allegedly given by first the deceased, and later the respondents. There was however, no evidence to substantiate such claims.

[18] In the upshot, the learned judge granted only the second prayer in encl 63 in that instead of the six-year period sought, the High Court granted a nine-month moratorium, so to speak, for the appellants to vacate the subject land. The High Court refused the order for sale in the terms sought.

[19] Following from the orders made in respect of encl 63, the learned judge found that the respondents were entitled to the order of possession and that the respondents must be given the right to evict the appellants who were clearly squatters — see *Ng Ben Thong & Ors v Krishnan all Arumugam* [1998] 5 MLJ

579. The reliefs as sought in (a)–(f) of the originating summons were thus granted. A

DECISION OF THIS COURT

[20] In the appeal before us, the appellants sought to canvass the following arguments in their written submissions. B

[21] First, that the application was inappropriately brought by the respondents as the originating summons seeks damages and other remedies in addition to the order for possession. According to learned counsel for the appellants, O 89 of the Rules of Court 2012 does not permit the court to make such orders. C

[22] Second, that there are disputes on facts in relation to the issue of whether licence or permission had been granted by the deceased. This is said to be borne out by the fact that the respondents themselves were unaware of the existence of the subject land until lately. The subject land did not manifest in the original list of assets when probate was first granted in June 1975. The respondents were only made aware of the existence of the subject land in August 2007 when the list of assets was amended to include the subject land. D E

[23] Third, that the appellants have been in occupation of the subject land for a considerable period during which time the appellants paid the local dues and were afforded the usual amenities of electricity and water. Such conduct on the part of the authorities rendered the summary process under O 89 of the Rules of Court 2012, unsuitable and inappropriate. F

[24] Learned counsel for the appellants further submitted that the appellants' applications for TOLs were rejected not because the subject land was already alienated to the deceased; it was rejected because it did not comply with reg 31 of the Pahang Land Rules 1992. G

[25] We are fully aware of the position and principles engaged when considering an application for summary possession under O 89 of the Rules of Court 2012. We believe so was the learned judge at the High Court. Order 89 of the Rules of Court 2012 on the summary possession of land reads as follows: H

1 Proceedings to be brought by originating summons. (O 89 r 1)

Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order. I

A [26] However, we see from the records and the submissions made, that
before the High Court, not all of these arguments were taken; or if intended in
the written submissions, such submissions were later abandoned. Particularly
in relation to the remedies that may be claimed in the originating summons.
B The same may be said of the issue on the appropriateness of the mode of
application or the availability of O 89 in circumstances where the status of the
appellants or occupiers is suspect or requires further examination.

C [27] When the appeal came before us, the matter of remedies that may be
sought together with the order for summary possession in the originating
summons, was not pursued. Similarly, there was no complaint on the summary
procedure invoked under O 89, that it was unsuitable to the particular facts
and circumstances in the instant appeal by reason of there being triable issues.
D The submissions by learned counsel for the appellants were more concerned
first, on a sale of the subject land and even then, the sale was only at a price that
the appellants were prepared to offer to the respondents; and second, that the
appellants be given time, as much as six years to vacate the subject land. In
effect, the focus was on the orders sought in encl 63 and which were in
substance, dismissed by the learned judge.

E [28] On this, it must be immediately pointed out that although the notice of
appeal dated 9 September 2016 (p 9 of the record of appeal *Jld* 1) indicates that
the appellants have appealed against the whole decision (keseluruhan
keputusan tersebut) that was made by the learned judge on 29 August 2016, it
would appear that the appeal was in substance and in reality, only against the
F decision made in respect of the originating summons, and not, the appellants'
own interlocutory application in encl 63. This is borne out by the grounds
raised in the memorandum of appeal, that there are no grounds of complaint
pertaining to the respondents' application under O 89.

G [29] On these two points, assuming these points can properly be taken
before us, which we do not believe to be the case for the reasons explained, we
are nevertheless, in full agreement with the learned judge on the interlocutory
application. The respondents cannot be forced to sell its subject land, and
H certainly not at a price that the parties cannot agree on. As for the time to
vacate, to accede to the request of the appellants would defeat the object and
purpose of O 89. The learned judge had ordered that nine months be given to
the appellants to vacate, and that time ran from the date of the order made on
29 August 2016. Absent of an order for stay that time expires in May 2017.
I There is no appeal by the respondents on this order, and so the time will expire
in May 2017, especially in view of the decision of this court in relation to the
appeal against the substantive orders of the High Court.

[30] Moving then to the appeal on the substantive appeal and taking first the

issue of the appropriateness of this summary procedure. The argument of the appellants being that there are triable issues that render this procedure unsuitable and that a full trial ought to have been ordered.

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[31] GS Nijar who was acting for the appellants in *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343; [1991] 1 CLJ 343 reminded the Supreme Court that O 89 is a reproduction of the English O 113. That reminder is instructive. In the commentary found in the *1988 White Book* (Vol 1) at pp 1470–1 on O 89, it is stated:

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For the particular circumstances and remedy described in r 1, this order provides a somewhat exceptional procedure, which is an amalgam of other procedures, eg, procedure by ex parte originating summons, default procedures and the procedure for summary judgment under O 14. Its machinery is summary, simple and speedy, ie, it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the respondent without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O 13 and, this order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, ie, there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto.

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[32] In other words, the procedure and thereby the remedy is not available where there are triable issues shown; that issue pertains to the occupation or the ownership of the subject land. In *Bohari bin Taib & Ors*, the Supreme Court allowed the appeal after finding that there was sufficient evidence placed before the court to show that the appellants had an arguable case on their occupation of the land in question. The appellants had already been alienated the land in question by the state government but prior to the issue of separate titles, the appellants were first issued TOLs and were actually holding over from the earlier consent or licence to occupy. Hence, their occupation and continued occupation were not as squatters simpliciter where there would have been no rights whatsoever.

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[33] In *Chiu Wing Wa v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313, the Supreme Court further clarified on the approach to O 89 in the context of tenants who were holding over in the following terms:

... it does not follow in this case that the Court is relieved from its duty to consider the further question of whether the tenants are trespassers pure and simple for which the summary procedure under O 89 has been specifically introduced or whether they are tenants holding over either from the previous or present landlords after the termination of the tenancy. The distinction is relevant for the purpose of O 89(1) of the RHC which provides:

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A Summary Proceedings For Possession of Land

B 1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

C The words in the parenthesis are crucial. If the appellants are tenants holding over after termination of the monthly tenancy by the notice to quit, then O 89 is inapplicable. It should be noted that O 89 has its origin in O 113 of the English Rules, and the principle behind *McPhail v persons, names unknown; Bristol Corporation v Ross and another* [1973] 3 All ER 393 is clearly to limit the operation of summary procedure of 1989 to trespassers pure and simple, whether known or unknown. In our view, the summary procedure should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be triable issue on the facts and the law for determination by evidence viva voce.

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E [34] Similar approaches may be seen in the decisions from the Court of Appeal in *Cheow Chew Koon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; *Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1; [1997] 1 CLJ 102; *Norimah Bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2000] 3 MLJ 129; [2000] 3 CLJ 133; *Juta Permai Sdn Bhd v Mohd Zain bin Jantan & Ors* [2001] 2 MLJ 322; [2001] 2 CLJ 1613; and *Tekad Urus Sdn Bhd (as the attorney for KCSB Konsertium Sdn Bhd) v Penduduk yang menduduki kawasan yang dipanggil Desa Perwira dan lain-lain* [2004] 2 MLJ 306; [2004] 2 CLJ 199.

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G [35] In all these cases, it is consistently reminded that the summary procedure is not available where the first entry or occupation was lawful. The summary procedure is intended to deal with the simple cases of trespassers or squatters, pure and simple.

H [36] On the facts in the present appeal, the title and ownership of the respondents are not in dispute. The respondents are the registered owners of the subject land. The appellants do not assert that the respondents' ownership as a result of alienation and grant by the state government was on terms that the appellants be allowed to occupy the subject property. Any suggestion to that end is completely devoid of basis and evidence.

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[37] As for the question of the appellants' entry to the subject land which they all claimed were with the consent, permission or licence of the deceased, the learned judge found these claims too, to be without merit. We are in complete agreement with the determination of the learned judge on this issue.

We do not find any appealable error on the part of the learned judge in reaching her conclusion, whether on the facts or on the law. Consequently, it would be highly improper and a wrong exercise of appellate jurisdiction for this court to intervene.

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[38] In considering the appellants' application in encl 63, the learned judge found that the appellants were prepared to buy the subject land for not more than RM1.5m. However, if their offer price was not accepted by the respondents, the appellants were prepared to move, but wanted to be given more time to do so. The learned judge has correctly rejected that application save for the matter of time to move out. The respondents cannot be forced to sell their property and certainly, not at a price that they are not agreeable to. Since the subject land is clearly theirs, the respondents would be seriously prejudiced from the enjoyment of their property if the appellants were given the lengthy period to vacate the subject land.

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[39] We further agree with the submissions of learned counsel for the respondents that it is clear that the appellants are approbating and reprobating at the same time. While on the one hand the appellants are resisting the summary application and contesting that they are more than squatters who have a right to stay, they are on the other hand, applying to the court to compel the respondents to sell the subject land or be given time to move. In *Cheah Theam Kheang v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761, the Court of Appeal explained the principle of approbation and reprobation:

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[105] We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand, he claims that the High Court order dated 16 July 2001 overrides or displaces a statute which render the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v News (UK) Ltd and Others* [1990] 3 All ER 376 at pp 383–384:

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There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

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[40] The appellants must be estopped from having elected to buy the subject land or in the alternative to move out from the subject land; the appellants cannot inconsistently, insist on staying and resisting the respondents' application.

A [41] In any case, we find that the application implicitly acknowledges the respondents' case for summary possession of their property, just like the appellants' application for TOL. Although those applications may have been rejected for technical or procedural reasons, the fact remains that the appellants made such application, implicitly acknowledging that they have no right to occupy the subject land.

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C [42] What is more glaring and troubling to this court are the appellants' claims and contentions that each of them were allowed to stay by the deceased at the material time. Each of the appellants claim to be given the consent, licence or permission to enter and occupy not by the respondents, but by the deceased, at the material time. Yet, this claim is not borne out by the evidence offered by the appellants themselves.

D [43] In the submissions made by the appellants' own counsel, the details of the occupation by the respective appellants were collated and shown at exh B at pp 55–81. A quick perusal of those details reveal that many of the appellants have not been forthright in their affidavits. The appellants claim to have been in occupation since 1967, during the lifetime of the deceased. Yet, by their own evidence and counsel's word, many if not all of the appellants have in fact only occupied the subject land after the demise of the deceased. See for instance the first appellant who started to occupy the subject land in 1976.

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F The other appellants occupied the subject land from or on the dates as follows:

- (a) the second appellant in 1977;
- (b) the third appellant in 1967;
- (c) the fourth appellant in 1975;
- G** (d) the fifth appellant in 1975;
- (e) the sixth appellant in 1980;
- (f) the seventh appellant in 1976;
- H** (g) the eighth appellant in 1977;
- (h) the ninth appellant in 1978;
- (i) the 11th appellant in 1980;
- I** (j) the 12th appellant in 1981;
- (k) the 13th appellant in 1985;
- (l) the 14th appellant in 1970;
- (m) the 15th appellant in 1977;

- (n) the 16th appellant in 1977; A
- (o) the 17th appellant in 1978;
- (p) the 18th appellant in 1990;
- (q) the 19th appellant in 1984; B
- (r) the 20th appellant in 1978;
- (s) the 21st appellant in 1984;
- (t) the 22nd appellant in 1977; C
- (u) the 23rd appellant in 1975;
- (v) the 24th appellant in 1985;
- (w) the 25th appellant in 1985;
- (x) the 26th appellant in 1980; and D
- (y) the 27th appellant in 1980.

[44] No information was offered in respect of the tenth appellant. Save for the third appellant, the claims of the other appellants simply cannot stand. In our view, this serious discrepancy offered by the appellants themselves severely undermines the credibility and veracity of the appellants' claims that they had each been given permission, consent or licence to enter and occupy the subject land at the material time by the deceased. Since the deceased passed away in 1975, there simply cannot be any ounce of truth to any of these contentions. E F

[45] The court always denounces any attempt at subverting the truth and that will include putting half-truths. All evidence, whether oral or set out in affidavits, must always be the truthful testimonies of the deponents. There are no exceptions to that requisite otherwise the rule of law will be severely tarnished. Consequently, the contentions of the appellants cannot hold. There are indeed no triable issues raised by the appellants to warrant a full trial and to say that the respondents' application under O 89 was highly inappropriate and unsuitable. We find that the learned judge was right in concluding that this was a suitable case for a grant of summary possession of the subject land. G H

CONCLUSION

[46] For all the reasons adumbrated, we therefore find that there are no errors of law or fact committed by the learned judge, whether in relation to the interlocutory application filed by the appellants, or in respect of the originating summons filed by the respondents to merit appellate intervention. The decision of the learned judge is therefore affirmed and the appeal is dismissed with costs. I

A *Appeal dismissed with costs.*

Reported by Ashok Kumar

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